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September 25, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: June 2, 2009

Case Number: TSO-0760

This Decision concerns the eligibility of XXXXXXXXXX (hereinafter referred to as “the individual”) for access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.”¹ For the reasons set forth below, I conclude that the individual should be granted a security clearance.²

I. BACKGROUND

The individual is employed by a Department of Energy (DOE) contractor, who requested a security clearance on his behalf in connection with that employment. As part of the ensuing background investigation, the individual completed a Questionnaire for National Security Positions (QNSP). In his response to question 23 of the QNSP, the individual informed the DOE that he had illegally possessed marijuana in 2002 and again in 2008, for approximately one week on both occasions. DOE Exhibit (Ex.) 6 at 42. Because this information raised security concerns, the LSO arranged for the individual to be interviewed by a personnel security specialist. After this Personnel Security Interview (PSI) did not resolve the concerns, the LSO determined that derogatory information existed that called into question the individual's eligibility for access authorization. The LSO sent the individual a letter (hereinafter referred to as “the Notification Letter”) setting forth those concerns. The Notification Letter also informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning his eligibility for a security clearance.

¹An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to in this Decision as access authorization or a security clearance.

² Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

The individual requested a hearing on this matter. The LSO forwarded this request to the Office of Hearings and Appeals, and I was appointed the Hearing Officer. The DOE introduced nine exhibits into the record of this proceeding and the individual presented the testimony of five witnesses in addition to testifying himself.

II. THE NOTIFICATION LETTER AND THE DOE'S SECURITY CONCERNS

A. The Notification Letter

As indicated above, the Notification Letter included a statement of derogatory information that created a substantial doubt as to the individual's eligibility to hold a clearance. This information pertains to paragraphs (k) and (l) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8.

Criterion (k) pertains to information indicating that the individual has "sold, transferred, possessed, used, or experimented with a . . . substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, . . . etc.) except as prescribed or administered by a physician" or otherwise authorized by federal law. Under this criterion, the Notification Letter cites the individual's admissions on his QNSP and during his PSI that he took possession of his wife's marijuana in September 2008 and March 2002, holding it for one week on each occasion, and that he could not give the DOE his absolute assurance that there was no marijuana in his home at the time of the PSI.

Under criterion (l), information is derogatory if it indicates that the individual "has engaged in any unusual conduct or is subject to any circumstances which tend to show that [he] is not honest, reliable, or trustworthy; or which furnishes reason to believe that [he] may be subject to pressure, coercion, exploitation or duress which may cause [him] to act contrary to the best interests of the national security. Such conduct include[s], but [is] not limited to, criminal behavior" 10 C.F.R. § 710.8(l). As support for this criterion, the Notification Letter cites (i) the individual's possession of marijuana in September 2008 and March 2002, (ii) his unwillingness to rule out taking possession of his wife's marijuana in the future or to guarantee that he could abide by the terms of a DOE Drug Certification, (iii) his statements that marijuana usage in moderation was fine and that he did not have a problem with his wife's continued usage of the drug, (iv) his admission that his wife has used marijuana continuously in their home, sometimes in his presence, since they began residing together in 2002 and (v) his statement that he associates with six other friends and relatives who use the drug.

B. The DOE's Security Concerns

The individual generally does not deny these allegations, and they adequately support the DOE's invocation of criteria (k) and (l). Association with people who engage in illegal activity involves questionable judgement, and can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Possession of illegal drugs also can raise questions about an individual's reliability and trustworthiness, because it calls into doubt an individual's willingness

or ability to comply with laws, rules and regulations. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House (December 19, 2005), Guidelines E and H.*

III. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a Hearing Officer must undertake a careful review of all of the relevant facts and circumstances, and make a “common-sense judgment . . . after consideration of all relevant information.” 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable or unfavorable, that has a bearing on the question of whether granting the individual a security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual’s conduct; the circumstances surrounding his conduct; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 is “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization.” 10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient to convince the DOE that granting access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). *See Personnel Security Hearing*, Case No. VSO-0013, 24 DOE ¶ 82,752 at 85,511 (1995) (*affirmed* by OSA, 1996), and cases cited therein. The regulations further instruct me to resolve any doubts concerning the individual’s eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

IV. FINDINGS OF FACT AND ANALYSIS

At the outset, I note that there is no indication in the record that the individual has himself used marijuana. The DOE does not make such an allegation in the Notification Letter, the individual testified at the hearing that he has never used marijuana or any other illegal drug, and this testimony was corroborated by each of his witnesses. Hearing transcript (Tr.) at 9, 26, 35, 38, 47, 52-53. Instead, the DOE’s concerns revolve around his possession of illegal drugs, the related doubts about his willingness to obey laws, rules and regulations, and around his associations with marijuana users, including his wife. For the reasons that follow, I find that the individual has successfully addressed these security concerns.

A. The Individual's Possession of Illegal Drugs

At the hearing, the individual testified that he took possession of his wife's marijuana in 2003 and 2008 because he was concerned about the frequency with which she was using the drug.³ He kept the marijuana for approximately one week on each occasion, and returned it to her because that was what they had agreed upon and because he wanted to be able to trust her to "take care of it appropriately, however she felt was reasonable." Tr. at 64-65. When asked why he didn't object to his wife's marijuana usage more strongly, he replied that he "felt that at some point she would quit," and that he wanted her "to approach the idea of abstaining on her terms," without "forcing the issue." Tr. at 65-66.

The record in this matter indicates that these were isolated incidents of illegal behavior on the part of the individual that are unlikely to be repeated. There are no indications of other violations of the law, and four of the individual's witnesses testified as to his honesty and law-abiding nature. Tr. at 29, 35, 39, 46. The individual's friend and former co-worker testified that he would be "surprised" if he discovered that the individual had done something illegal, and his mother-in-law stated that he is "very much a straight arrow." Tr. at 40-41, 46.

Furthermore, I believe it unlikely that the individual will engage in similar behavior in the future. As an initial matter, the individual's wife has testified that she intends to refrain from all future marijuana use, and for the reasons set forth in section B below, I found that testimony to be credible. Tr. at 21. In addition, the individual stated at the hearing that, if his wife began using marijuana again, he would not take possession of the drug, but would instead contact DOE security for instructions. That the individual reported his possession of marijuana and his wife's use of the drug to the DOE supports this testimony. DOE Ex. 6 at 42; DOE Ex. 8 at 8.

Such an action would be completely consistent with the individual's previous compliance with security requirements. In addition to his compliance to the requirement that he be honest and forthcoming in his communications with the DOE, the record indicates that he held a Defense Department clearance from 1999 until the individual changed jobs in October 2000, without evidence of any security violations. DOE Ex. 6 at 43-44; Tr. at 69. Moreover, the individual testified that had he had a security clearance at the times that he took possession of his wife's marijuana, his actions would have been "vastly" different. Tr. at 71. He also stated in his response to the Notification Letter that he would abide by the terms of a DOE Drug Certification, if given that opportunity. DOE Ex. 2. I am convinced that the individual would be willing and able to abide by all applicable DOE security requirements.

³ The Notification Letter alleges that the individual possessed marijuana in 2002, not 2003, and cites the individual's statements on the QNSP and during his PSI as support for this allegation. However, the individual indicated on the QNSP that the March 2002 date was an estimate, and his statements during the PSI made it clear that he was unsure at that time about whether the first possession of marijuana occurred in 2002 or 2003. DOE Ex. 6 at 42; DOE Ex. 8 at 15-16. At the hearing, the individual testified that he "thought it was 2002 at first," but later realized that the possession occurred in 2003. Tr. at 58.

B. Associations with Marijuana Users

1. The Individual's Wife

The individual's wife testified that she has permanently ceased her usage of marijuana, that her last usage of the drug was during a party approximately two months prior to the hearing, and that the last time that marijuana was present in the home that she and the individual share was during the fall of 2008. Tr. at 10, 11, 18, 21.

At the outset, I note that, if the individual's wife was the prospective clearance holder, and not the individual, two months of abstinence would almost certainly be insufficient to demonstrate adequate evidence of reformation or rehabilitation from her repeated marijuana usage. This is especially the case since the individual's wife has not undergone any marijuana use counseling. Tr. at 23. In a number of previous cases involving marijuana usage by clearance holders or applicants, OHA Hearing Officers have found insufficient evidence of reformation or rehabilitation despite longer periods of abstinence than that claimed by the individual's wife. *See, e.g., Personnel Security Hearing*, Case No. TSO-0476 (2007) (9 months of abstinence insufficient evidence of reformation); *Personnel Security Hearing*, Case No. TSO-0088 (9 months of abstinence and drug counseling insufficient evidence of reformation or rehabilitation).

However, I do not believe that the standards that we employ in cases involving drug usage by clearance holders or applicants should necessarily apply in this case. As an initial matter, it is not the clearance applicant whose judgement and reliability are being impaired by the intoxicating effects of marijuana. Furthermore, the clearance applicant is not being subjected to the habituating effects of the drug. As for what standards of rehabilitation or reformation should apply in cases of this nature, the large number of potential scenarios suggests that a case-by-case approach is appropriate.

The circumstances in this case provide several compelling reasons for believing that the individual's wife will be able to refrain from future marijuana usage. First, the individual is the primary, and perhaps the sole, wage-earner in the family, and I believe it unlikely that his wife would jeopardize her family's financial security by using marijuana or keeping the drug in their house. "I'm a stay-at-home mom," the individual's wife testified, "and I fully intend to do whatever I need to do to help [the individual] attain this clearance and hold this job so that we will be financially secure and my children can have food on the table." Tr. at 11. Second, she stated that she and the individual have "decided that . . . , if he was aware of my possession of it that he would be legally required to contact authorities and . . . , I would have to deal with the ramifications of that decision." Tr. at 12. Finally, the individual's wife testified that she and the individual have been certified by the state in which they reside as foster parents, and the presence of any illegal drugs in their home would jeopardize that certification. Tr. at 71. Based on the forgoing, I find that the individual has successfully addressed the DOE's security concerns regarding his wife's usage of marijuana.

2. The Individual's Relatives and Friends

At the hearing, the individual also testified about his associations with six others whom he believed to have been marijuana users. Two of these six, his friends, have moved to another city. Of the

remaining four (his wife's father and step-mother, and his wife's step-sisters), the father and step-mother have stopped using marijuana, and the step-sisters, whom he sees approximately once every 18 months, have never used the drug in his presence. Tr. at 53-54. The individual's wife testified that she and the individual have agreed that, if they are at a social function at which they become aware that illegal drugs are being used, they would immediately leave. Tr. at 18-19. This testimony, which I found to be credible, leads me to believe that the individual no longer associates with marijuana users.

V. CONCLUSION

Based on the evidence before me, I have concluded that the individual's possessions of marijuana are isolated incidents that are unlikely to be repeated, and that he is an honest and reliable person who can be trusted to abide by DOE security regulations and procedures. I further conclude that he no longer knowingly associates with users of illegal drugs. The individual has therefore produced sufficient evidence of mitigating factors to allay the DOE's security concerns under paragraphs (k) and (l), and has demonstrated that granting him access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, the individual should be granted a security clearance. The DOE may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Robert B. Palmer
Senior Hearing Officer
Office of Hearings and Appeals

Date: September 25, 2009